



May 2, 2019

**SUBMITTED VIA FOIA ONLINE**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
<https://www.foiaonline.gov>

***RE: Freedom of Information Act Request Re: Deepwater Ports and Texas Gulf Terminals***

Dear National Freedom of Information Officer:

We represent Sierra Club in making this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records pertaining to EPA’s review of deepwater ports supplying Very Large Crude Carrier vessels, as well as EPA’s review of Texas Gulf Terminals, Inc.’s plan to build one such port. Sierra Club requests a fee waiver, because the records sought are not publicly available, disclosure would serve the public interest and contribute significantly to the public’s understanding of EPA’s operations, and Sierra Club has no commercial interest in making this request.

**I. Background**

This request seeks records bearing on EPA’s review of applications to build deepwater ports for the export of crude oil capable of supplying Very Large Crude Carrier vessels (“VLCCs”), international oil tankers that can carry more than 2 million barrels of oil each. As defined by the Deepwater Port Act, 33 U.S.C. §§ 1501 et seq., a “deepwater port,” is

any fixed or floating manmade structure other than a vessel, or any group of such structures, that are located beyond State seaward boundaries and that are used or intended for use as a port or terminal for the transportation, storage, or further handling of oil or natural gas for transportation to or from any State . . . .<sup>1</sup>

Deepwater ports are an emerging area for federal regulation, which pose environmental concerns and have significant economic ramifications. Presently, only one deepwater, crude oil port exists in the United States, off the coast of Louisiana.<sup>2</sup> But within the last year alone, the federal government received three applications to build deepwater crude export terminals in

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<sup>1</sup> 33 U.S.C. § 1502(9).

<sup>2</sup> MARAD, Deepwater Port, Approved Applications and Operational Facilities, <https://www.maritime.dot.gov/ports/deepwater-ports-and-licensing/approved-applications-and-operational-facilities> (accessed Mar. 26, 2019).

Texas.<sup>3</sup> Industry observers believe more deepwater port applications will follow.<sup>4</sup> In one of the new applications, filed in August 2018, Texas Gulf Terminals, Inc. (“TGTI”) seeks a license to construct a deepwater port 15 miles off the coast of Kleberg County, Texas.<sup>5</sup> TGTI’s application references its discussions with EPA, including EPA Region 6, about permitting under the Clean Air Act and Clean Water Act for the TGTI Port and/or a hypothetical port project resembling TGTI Port.<sup>6</sup>

We believe EPA Region 6, EPA Headquarters—particularly the Offices of Air and Radiation, the Office of Water, and the Office of the Administrator—and EPA Region 4, may be the most likely offices to have information responsive to this request.

## II. Records Requested

Sierra Club requests the following records in the possession, custody, or control of EPA that were created, stored, considered, and/or received relating to:

- (1) The applicability or inapplicability of federal or state standards or rules to any source or facility licensed, or seeking to be licensed, under the Deepwater Port Act, 33 U.S.C. §§ 1501 et seq. Your search should include, but not be limited to, the following laws and their implementing regulations:
  - a. the Clean Air Act, 42 U.S.C. §§ 7401 et seq.,
  - b. the Clean Water Act, 33 U.S.C. §§ 1251 et seq.,
  - c. the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1431 et seq., 33 U.S.C. §§ 1401 et seq., 2801 et seq.,
  - d. the National Environmental Policy Act, 42 U.S.C. §§ 4231 et seq., and
  - e. state laws;
- (2) Draft permits, waivers, exemptions, and/or extensions from federal statutory or regulatory requirements for any source or facility licensed, or seeking to be licensed, under the Deepwater Port Act, 33 U.S.C. §§ 1501 et seq.;
- (3) Documents providing or containing guidance from EPA staff on the interpretation or application of federal statutes, standards, or rules to any source or facility licensed, or seeking to be licensed, under the Deepwater Port Act, 33 U.S.C. §§ 1501 et seq.;

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<sup>3</sup> MARAD, Deepwater Port, Pending Applications, <https://www.maritime.dot.gov/ports/deepwater-ports-and-licensing/pending-applications> (accessed Mar. 26, 2019).

<sup>4</sup> M. Gordon, SPGGlobal Platts, *US Marks one year of VLCC Oil Exports from LOOP as New Ports Line Up*, Feb. 20, 2019, <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/022019-us-marks-one-year-of-vlcc-oil-exports-from-loop-as-new-ports-line-up>.

<sup>5</sup> TGTI DWPA Application, Vol. 1, Doc. No. MARAD-2018-0114-0002, at pp. 7-1 to 7-2 (Aug 2, 2018), <https://www.regulations.gov/document?D=MARAD-2018-0114-0002>

<sup>6</sup> See, e.g., TGTI DWPA Application Vol. 1, App’x X – NPDES Applicability Evaluation, MARAD-2018-0114-0004, at pp. 4–5 (describing communications between TGTI’s contractor and EPA Region 6), <https://www.regulations.gov/document?D=MARAD-2018-0114-0004>; *Id.* App’x V – Air Quality Env’tl. Docs., NSR Application (Appendix B).

- (4) The TGTI Port project described in the Background section above from January 1, 2016, to the present. This request should be read to include any communications involving TGTI, Trafigura US, Inc., or their agents or contractors, concerning any conceptual or hypothetical project to construct an offshore, deepwater port to export crude oil by VLCC;
- (5) EPA's authority to regulate air emissions under the Clean Air Act or water discharges under the Clean Water Act from oil tanker vessels that arrive at any port in United States' ocean waters beyond a state's seaward boundary.

This request does not include documents that are readily available on MARAD's or EPA's website or publicly available as part of Docket Folder MARAD-2018-0114 on regulations.gov.

For purposes of this request, the term "records" is used to mean anything denoted by that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

As you are aware, FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104, and that your response "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [, if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility & Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose the requested records as they become available to you without waiting until all of the communications and records have been assembled for the time period requested. We request electronic copies of the records whenever possible.

### **III. Claims of Exemption from Disclosure**

We ask that you exercise your discretion to the fullest extent in favor of disclosing records responsive to this FOIA request.<sup>7</sup> However, should you decide you must withhold any records under claim of a FOIA exemption, please identify each such record in writing, give a brief description of the contents of that record, and explain the agency's justification for withholding it. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempt from disclosure. Finally, if a document does not exist, please indicate that in your written response.

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<sup>7</sup> *See* Atty. Gen. Mem. to Heads of Exec. Dep'ts and Agencies (Mar. 19, 2009) ("An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

#### IV. Fee Waiver

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). Sierra Club is the nation's oldest grassroots organization with more than 3.5 million members and supporters nationwide. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy and clean water. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.<sup>8</sup>

FOIA provides that fees shall be reduced or waived, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>9</sup> EPA regulations state the agency should grant a fee waiver if: (1) disclosure of the requested information would be likely to contribute significantly to public understanding of the government's operations or activities; and (2) disclosure of the information is not primarily in the commercial interest of the requestor.<sup>10</sup> Sierra Club seeks information that will contribute significantly to the public's understanding of EPA's work in regulating deepwater ports, which are a relatively novel, potentially large source of air and water pollution, with global environmental and economic ramifications. Sierra Club will not benefit commercially from the records produced.

As one court explained, if a non-profit organization has "identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership," then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that Sierra Club meets the required criteria and is entitled to a full fee waiver.

##### A. Disclosure is in the Public Interest.

The disclosure of this information is in the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."<sup>11</sup> In assessing the public interest, EPA regulations require the agency to consider: (1) the subject of the request; (2) the informative value of the information to be disclosed; (3) the contribution to the public's understanding of the subject from disclosure; and (4) the significance of that contribution.<sup>12</sup>

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<sup>8</sup> For a recent example, see FOIA Request Reference No. EPA-HQ-2019-004954 (fee letter waiver received April 16, 2019).

<sup>9</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>10</sup> 40 C.F.R. § 2.107(l).

<sup>11</sup> *See id.*

<sup>12</sup> *See* 40 C.F.R. § 2.107(l)(2).

i. **Subject of the Request: The request concerns the operations or activities of EPA.**

Sierra Club seeks information related to EPA's review of deepwater ports and the TGTI Port proposal in particular. The request concerns EPA's core missions of implementing the Clean Air Act, Clean Water Act, and other environmental laws. EPA is an arm of the federal government, and there is no question that the requested records concern "operations or activities of the government."<sup>13</sup>

ii. **Informative Value of Information: The disclosure will contribute to an understanding of government operations and activities, because there is currently little information available to the public on the topic of EPA's review of deepwater ports.**

The records Sierra Club requests are "meaningfully informative" and "likely to contribute" to a greater understanding of EPA's operations and activities. The records are not otherwise in the public domain and are not accessible other than through a FOIA request.<sup>14</sup>

Undersigned counsel has been unable to locate any firm guidance on how EPA handles permitting and review of deepwater ports on the agency's public website; nor, apparently, did TGTI.<sup>15</sup> Given the significance of deepwater ports to the nation's environment and economy, as well as the increasing interest of industry in building them, EPA should make the requested records available to the public.

iii. **Contribution to Public Understanding: The information will contribute to the public's understanding of environmental regulation of deepwater ports and the TGTI Port proposal.**

This information will contribute to the understanding of the general public.<sup>16</sup> EPA's FOIA regulations specify that, to obtain a fee waiver, "disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester."<sup>17</sup> In addition, "[a] requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered."<sup>18</sup>

Disclosure of the information sought will improve the general public's understanding of EPA's regulation of deepwater ports and the TGTI Port proposal. Deepwater ports are matters of

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<sup>13</sup> See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2)(ii).

<sup>14</sup> See 40 C.F.R. § 2.107(l)(2)(ii).

<sup>15</sup> See *supra* note 6 (discussing TGTI's contractors' communications with EPA to seek permitting guidance).

<sup>16</sup> See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

<sup>17</sup> 40 C.F.R. § 2.107(l)(2)(iii).

<sup>18</sup> *Id.*

important public debate, both in shoreline communities in Texas and nationally.<sup>19</sup> The public has good reason to take interest. Installing additional deepwater ports could significantly alter the United States' oil export market. A single VLCC, on a single voyage, would have the capacity to export the same amount of crude oil, 2 million barrels, as the entire United States exported on a daily average basis in July 2018.<sup>20</sup>

Deepwater ports implicate major environmental concerns as well. The TGTI Port and its components would have the potential to release large quantities of Volatile Organic Compounds ("VOCs"), particulate matter, NO<sub>x</sub>, SO<sub>2</sub>, carbon monoxide, greenhouse gases, and other air pollutants.<sup>21</sup> The TGTI Port would transfer vast quantities of crude oil and induce increased VLCC traffic in the uncontrolled environment of the open Gulf, potentially heightening the risk of an oil spill and other water pollution.

As explained above, the information requested currently is not available to the general public, which has a strong interest in gaining access to these records.

Sierra Club is well-positioned to disseminate the records responses to ensure the public is well informed. As the nation's oldest and largest grassroots environmental organization, Sierra Club will draw on its institutional expertise to increase public understanding of issues related to the environment and public health, as well as the operations of the federal government related to such issues. Sierra Club has approximately 3.5 million members and supporters, including online activists and newsletter subscribers. Sierra Club intends to make publicly available any significant information released pursuant to this request through various means, such as its website, which is highly trafficked, and social media and other channels. Every year, for example, the Sierra Club website receives about 26,298,200 unique visits and 30,358,239 page views; on average, the site gets 72,049 visits per day.

Moreover, Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, web videos, and news reports. *Sierra Magazine* is a bi-monthly magazine with a printed circulation of approximately 675,000 copies. *Sierra Club Insider*, an electronic newsletter, is sent to about 3.5 million people twice a month. Sierra Club also will leverage its position as the nation's oldest and largest grassroots environmental organization to gain earned media coverage in newspapers, radio, and television for any newsworthy information obtained as

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<sup>19</sup> See, e.g., M. Gordon, *US Marks one year of VLCC Oil Exports from LOOP as New Ports Line Up*, *supra* note 4; Reuters, *Trading firm Trafigura Looks to Build U.S. Deep Water Oil Port* (Aug. 6, 2018), <https://www.reuters.com/article/trafigura-usa-oil/trading-firm-trafigura-looks-to-build-us-deep-water-oil-port-idUSL5N1UX4XW>; S. Chapa, Houston Chronicle, *Deepwater Rivalry: Competing Offshore Crude Oil Export Terminals Proposed near Houston* (Feb. 1, 2019), <https://www.houstonchronicle.com/business/energy/article/Deepwater-Rivalry-Competing-offshore-crude-oil-13580640.php>; T. Acosta, Corpus Christi Caller Times, *Trafigura Proposes Offshore Oil Export Facility that Could Circumvent Port of Corpus Christi* (Aug 6, 2018), <https://www.caller.com/story/news/local/2018/08/06/offshore-oil-export-facility-could-circumvent-port-corpus-christi/913729002/>.

<sup>20</sup> Reuters, *supra* note 19.

<sup>21</sup> TGTI App. App'x V, *supra*, at App'x A ("Air Quality Info. For Env'tl. Impact Statement"), p. 27, Table A-2.

a result of this request.<sup>22</sup> Sierra Club also disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. These types of public outreach are sufficient to warrant a fee waiver. *See W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (noting cases holding “statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver”).

The information requested here would contribute to the public’s understanding of environmental regulation of deepwater ports, and Sierra Club is suited to disseminate important information that EPA provides.

**iv. Significance of Information: The information will contribute “significantly” to public understanding of environmental regulation of Deepwater Ports and to the TGTI Port proposal.**

EPA’s FOIA regulations provide that “[t]he public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.”<sup>23</sup> As explained above, none of the materials we have requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of environmental regulation of deepwater ports, a growing and significant facet of the nation’s oil and gas industry. As discussed above, Sierra Club will make any significant information or documents received in response to this request publicly available.

**B. Commercial Interest Factor**

Prior to granting a fee waiver, EPA must assess “the existence and magnitude of a commercial interest,” if any, of the FOIA requestor in the production of requested documents.<sup>24</sup> If the requestor has a commercial interest in disclosure, the agency should weigh “[w]hether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’”<sup>25</sup> A fee waiver is justified where “the public interest is greater in magnitude than that of any identified commercial interest.”<sup>26</sup>

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<sup>22</sup> For example, Sierra Club recently publicized the results of its FOIA requests regarding agency job freezes, a story that was picked up by the Washington Post. Alexander Rony, *Trump Admin Policy Leaves 700 CDC Jobs Vacant*, The Planet, <http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant>; Lena H. Sun, *Nearly 700 vacancies at CDC because of Trump administration’s hiring freeze*, The Washington Post, [https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm\\_term=.6c2e70d8581e](https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.6c2e70d8581e).

<sup>23</sup> 40 C.F.R. § 2.107(1)(2)(iv).

<sup>24</sup> 40 C.F.R. § 2.107(1)(3)(i).

<sup>25</sup> 40 C.F.R. § 2.107(1)(3)(ii).

<sup>26</sup> *Id.*

Sierra Club is a non-profit organization with no commercial, trade, or profit interests in the requested information. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)). Sierra Club seeks to use this information solely to inform the public and to support advocacy efforts to protect human health and the environment through appropriate and legally required environmental regulation of deepwater ports. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest. Even if EPA were to find, incorrectly, that Sierra Club has a commercial interest in disclosure, that interest would pale in comparison to the public interest in disclosure. The agency should grant this fee waiver request.

Sierra Club respectfully requests that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) because the public will be the primary beneficiary of this requested information. In the event that your agency denies a fee waiver, please send a written explanation for the denial. Please do not incur expenses beyond \$50 without first contacting our office for explicit authorization. If EPA does not believe that the above information is sufficient to justify a fee waiver,<sup>27</sup> please contact us to discuss any further documentation we can provide to assist in your resolution of the waiver request.

## **V. Conclusion**

Please send the requested records by email to [mlbrown@earthjustice.org](mailto:mlbrown@earthjustice.org) or, for records not available electronically, by regular mail to Michael L. Brown, Earthjustice, 50 California Street, San Francisco, CA 94111. If you find that this request is unclear in any way, please do not hesitate to contact me by phone at (415) 217-2042.

Thank you for your time and assistance. We look forward to your prompt reply.

Sincerely,

/s/Michael L. Brown

Michael L. Brown  
Staff Attorney  
Earthjustice  
415-217-2042

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<sup>27</sup> With the award-winning Sierra magazine and its extensive use of blogs to communicate with the public, Sierra Club would also be eligible for a fee waiver as a media requestor. 5 U.S.C. § 552(a)(4)(A)(ii); 40 C.F.R. § 2.107(c)(1)(iii); *see also* 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).



mlbrown@earthjustice.org

Submitted on behalf of:

Sierra Club